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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 1729

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, Individually and as President of the University of North Carolina.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April, 1980

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Opinions Below

The district court's opinion is reported at 401 F. Supp. 775. The Fourth Circuit's opinions are reported at 547 F.2d 801, 558 F.2d 727, and 591 F.2d 997. These opinions are set forth in petitioners' Supplemental Appendix to Petition for Writ of Certiorari. This Court's previous opinion in this case is reported at 438 U.S. 912.

Statement of the Case

Solely for the purpose of this Brief in Opposition, intervening respondents accept the Statement of the Case presented in the Petition for Writ of Certiorari.

Argument

REASONS FOR DENYING THE WRIT

Petitioners present in their petition for a writ of certiorari the following three reasons for granting the writ:

1. To determine whether Congress has the power to deprive a senior judge of the Court of Appeals of the power to sit en banc;

2. To determine whether Congress has the power to deprive a senior judge of the Court of Appeals of the power to sit en banc with respect to a case pending before the en banc court on or before October 20, 1978; and

3. To determine whether a United States Court of Appeals is empowered to allow reargument on a case after the time for petitioning for reargument and the time for petitioning for a writ of certiorari have expired.

Respondents, intervening defendants below, oppose the granting of the writ. They submit that each of these issues has previously been determined by this Court and that they therefore do not present any issues of public importance. In addition, respondents oppose the granting of the writ for the reason that the order sought to be reviewed is an interlocutory decree that fails to satisfy this Court's stated criteria for the discretionary review of interlocutory orders of the Courts of Appeals. For these reasons, respondents request that the petition be denied.

I.

THE ORDER BELOW IS AN INTERLOCUTORY DECREE WHICH SHOULD NOT BE REVIEWED AT THIS TIME

The order of the Fourth Circuit below, dated November 9, 1979, said that the court's previous mandate in this case was recalled, that its opinion dated February 2, 1979, was withdrawn, that the case was returned to the hearing calendar for reargument before a properly constituted en banc court, and that the clerk was directed to fix a date for reargument as soon as an en banc court could be convened. Following this determinination by the Fourth Circuit, plaintiffs filed their petition for a writ of certiorari to review the order of November 9, 1979 of the Fourth Circuit.

Pursuant to the November 9, 1979 order of the Fourth Circuit, the clerk duly notified the parties herein that reargument before the court was scheduled for January 7, 1980. On that date, the parties appeared for reargument before an en banc court properly constituted under the Omnibus Judgeship Bill, 28 U.S.C § 46(c). Decision on the case was reserved and has not yet been announced by the en banc court.

In the absence of special circumstances, this Court has refused to review, upon petition for a writ of certiorari, interlocutory orders of the courts of appeals. Such orders have been considered as "not yet ripe for review by this Court". Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook Railroad Company, 389 U.S. 327, 328 (1967). As this Court stated in Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916), "except in extraordinary cases, the writ is not issued until final decree." See also American Construction Co. v. Jacksonville, T. & K. W. Ry Co., 148 U.S. 372, 378 (1893); The Three Friends, 166 U.S. 1, 49 (1897); The Conqueror, 166 U.S. 110, 113 (1897); Denver v. New York Trust Co., 229 U.S. 123, 133 (1913). Moreover, the Court has noted that the inter-

locutory nature of a decree by a court of appeals is "a fact that of itself alone furnishe(s) sufficient ground for the denial of the application" for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., supra, 240 U.S at 258.

Under the rules of this Court, interlocutory decrees are reviewed only if "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause", American Construction Co. v. Jacksonville, T & K. W. Ry. Co., supra, 148 U.S. 384, or to decide important, unresolved legal issues of great public moment that are basic to continued litigation of the case, see, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). Failure to grant the writ, however, wil not cause any special embarrassment or inconvenience to the parties in the conduct of this case. Nor does the petition present any substantial, unresolved issues of law. Hence, respondents submit, there are no substantial reasons warranting immediate reivew of the interlocutory order issued by the court below.

The Fourth Circuit's order is interlocutory in the purest sense of the word. It did no more

than direct the parties to reargue the case. Petitioners were free to make upon reargument before the Fourth Circuit whatever arguments they intend to present to this Court. Moreover, the Fourth Circuit is bound to consider, while the case is pending before it, any and all applicable legal principles. See Huddleston v. Dwyer, 322 U.S. 232, 236-37 (1944). Accordingly, respondents contend that this Court should, in the present instance, follow its "normal practice of denying interlocutory review". Estelle v. Gamble, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). After the Fourth Circuit has had an opportunity to render its decision, petitioners will then have ample time and opportunity to petition this Court for a writ of certiorari if they deem it either necessary or desirable.

II.

WHETHER CONGRESS CAN PRECLUDE A JUDGE OF SENIOR STATUS FROM SITTING EN BANC IS AN ISSUE WHICH HAS BEEN PREVIOUSLY DETERMINED BY THIS COURT.

This Court has examined in a variety of different contexts the question of the power of the judges of the Courts of Appeals to hear and determine cases en banc and the question of the rights of litigants with respsect to en banc

hearings. The issues were explored at great length in Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U..S 326 (1943) and Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953).

More recently, the subject came up for review in United States v. American-Foreign Steamship Corp., 363 U.S. 684 (1960). This was a suit by the Steamship Company against the United States to recover amounts of alleged excessive charter hire assessed by the Maritime Commission with respect to ships chartered by the Steamship Company from the United States. The action was dismissed by the district court. The United States Court of Appeals for the Second Circuit affirmed. Circuit Judge Harold Medina sat on the panel. On December 19, 1957, the Second Circuit granted the Steamship Company's petition for rehearing en banc and ordered that "argument thereon be confined to written briefs to be submitted within twenty days." Id., 363 U.S. at 686. Thereafter, on March 1, 1958, Judge Medina retired and assumed senior status. Approximately, five months later, on July 28, 1958, the court rendered an en banc decision in which Circuit Judge Medina participated. Because 28 U.S.C. § 46(c) then pro-

vided that a "court en banc shall consist of all active circuit judges of the circuit", judge Clark dissented.

The United States petitioned for another rehearing en banc. The petition was denied on the ground that

> (s)ince Judge Medina was a member of the court en banc which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached.

265 F.2d 136, 154. Judge Clark and one other judge dissented. They held that Judge Medina's participation in the en banc determination was barred by the plain language of the statute. This Court granted certiorari to consider the issue which had been raised by judge Medina's participation in the en banc hearing.

In its decision, this Court noted that the "view that a retired circuit judge is eligible to participate in an en banc decision thus finds support neither in the language of the controlling statute nor in the circumstances of its enactment". United States v. American-Foreign Steamship Corp., supra, 363 U.S. at 689. Quoting judge Clark in the opinion below, this Court said, "the

evident policy of the statute was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court.'" Id., at 690. In language that is dispositive of the issues which petitioners request this Court to review, this Court said.

> Persuasive arguments could be advanced that an exception should be made to permit a retired circuit judge to participate in en banc determination of cases where, as here, he took part in the original three-judge hearing, or where, as here, he had not yet retired when the en banc hearing was originally ordered. Indeed, the Judicial Conference of the United States has approved suggested legislative changes that would provide such an exception, and a bill to amend the statute has been introduced in the Congress. But this only serves to emphasize that if the statute is to be changed, it is for Congress, not for us, to change it.
>
> We conclude for these reasons that under existing legislation a retired circuit judge is without power to participate in an en banc Court of Appeals determination, and accordingly that the judgment must be set aside.

Id., at 690-691.

The issues which petitioners seek to present to this Court in their petiion for writ of certiorari are thus identical to those resoved in

United States v. American-Foreign Steamship Corp., supra. In their petition, the petitioners recite that prior to the time of this Court's previous grant of certiorari in this case, Senior Circuit Judge Bryan participated in an en banc hearing of this case, that following the remand by this Court, 438 U.S. 912, to consider the issues herein in light of Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Congress amended 28 U.S.C. § 46(c) to provide for the exclusion of senior judges from participation in en banc hearings, that thereafter argument before another en banc court of the Fourth Circuit was scheduled, and that judge Bryan again participated in the en banc hearing. There is nothing in this recitation of facts which differs in any substantial way from the facts in American Foreign Steamship Corp., other than that in the present case, unlike the latter, the Court of Appeals recognized its mistake and sought to correct it by recalling its mandate and withdrawing its opinion rather than rely upon the parties to seek a reversal pursuant to a writ of certiorari.

In bringing this petition, petitioners have not only failed to examine the applicable precedents of this Court but they have also failed to pay heed to this Court's admonition that "§ 46(c) is not addresssed to litigants. It is addressed to the Court of Appeals." Western Pacific Railroad Corporation v. Western Pacific Company, supra, 345 U.S. at 250. In that opinion, this Court explicitly stated that § 46(c) "deals, not with rights, but with power", Id. at 259, and noted that "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." Id. at 259.

In the past, senior circuit judges were denied the privilege of sitting en banc, see United States v. American-Foreign Steamship Corp., supra; Western Pacific Railroad Corp. v. Western Pacific Railroad Co., supra; United States v. Sentinel Fire Ins. Co., 178 F.2d 217, 239 (5th Cir. 1949)(dissenting opinions of judges Holmes and McCord). Recently, however, they were able to exercise the privilege for a brief period of time. See Moody v. Albemarle Paper Co., 417 U.S. 622 (1974). This is no longer possible since the amendment of 28 U.S.C. § 46(c) by Congress on October 20, 1978. The denial of this privilege is not unconstitutional. This was the

holdings in this Court's decisions in United States v. American-Foreign Steamship Corporation, supra, and Moody v. Albemarle Paper Co. supra.

Moreover, the constitutionality of Congress' powers to enact statutes providing for the conduct of business by inferior federal courts created by it was examined at great length by Justice Harlan in his concurring opinion in Chandler v. Judicial Council, 398 U.S. 74, 95-126 (1970). Also, this Court said in United States v. American-Foreign Steamship Corp., supra, that "Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of en banc decision to the permanent active membership of a Court of Appeals." 363 U.S. at 689. Congress' exclusion of senior judges from en banc hearings is logically related to and commensurate with the Congressional purpose of permitting each Court of Appeals "to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions...." Id. 363 U.S. 689-690. This purpose is legitimate and can be constitutionally effectuated by § 46(c).

III.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAD THE POWER AND DUTY TO CORRECT ITS FAILURE TO COMPLY WITH § 46(c) AND TO GRANT REARGUMENT.

Petitioners' arguments in support of their petition for a writ of certiorari are ultimately based upon a claim that the Fourth Circuit was disabled, once it discovered its noncompliance with 28 U.S.C. § 46(c), from correcting its mistake and ordering reargument simply because the time for respondents to petition either for rehearing or for a writ of certiorari had expired. Such a rule, however, has nothing to commend it. If followed, it would cause grave damage to the ability of a Court of Appeals to "maintain its integrity as an institution", United States v. American-Foreign Steamship Corp., supra, 363 U.S. at 689.

Furthermore, this Court has stated, that in

> "reocgnizing the value of an efficient use of the en banc power, the court should adopt such means as will determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable."

Western Pacific Railroad Corp. v. Western Pacific Co., supra, 345 U.S. at 261.

More specifically, petitioners' claim is contrary to a century of precedents of this Court and the lower federal courts. As early as 1882, this Court announced that

> It is a general rule of the law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the Term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court.

Bronson v. Schulten, 104 U.S. 410, 415 (1882). The power to revise the judgment, however, did not exist once the term had expired except by a "writ of error coram vobis...allowed to bring before the same court in wich the error was committed some matter of fact which had escaped attention, and which was material in the proceeding." Id. at 416.

The issue came before the Court again in 1944 in Huddleston v. Dwyer, 322 U.S. 232 (1944). In Huddleston, petitioners sought a second rehearing in the Second Circuit six months after entry of a previous judgment. The request was based upon an

intervenig state court decision which was rendered after the time for rehearing had passed. The Second Circuit denied the request. The Supreme Court vacated the decision of the Second Circuit. It held that "until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decisions of the highest state court." 322 U.S. at 236.

In 1970, a case similar to Huddleston came again before the Second Circuit. In a panel consisting of judges Friendly, Hays, and Kaufman, the Second Circuit, taking cognizance of the earlier decision by the Supreme Court in Huddleston, said

> It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired....
>
> This Circuit has long shown considerable willingness to correct what it believed an erroneous interpretation of the law....
>
> Even more telling was the Court's action in Huddleston v. Dwyer... where it vacated a Court of Appeals decision for failing to consider a new state court opinion that... was handed down after the time for rehearing had expired... Instead of reversing the court of appeals ... the Supreme Court there vacted the court of appeals decision, and

> remanded to that court to permit it to determine the issues of state law in the first instance ... For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petiton for certiorari has been filed would be, it seems to us, wasteful, for under the Huddleston procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider...

Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429-430 (2d Cir. 1970).

The only cases in which this Court has denied either itself or a lower federal court the power to revise its judgment beyond the time period specified for rehearing have been federal income tax cases where there exists a federal statute which specifically prescribes the time period after which a judgment is final and beyond the power of a court to revise. See R. Simpson & Co. v. Commissioner of Internal Revenue, 321 U.S. 226, 227-230 (1944). No such statute exists in this case and none is suggested by petitioners.

These considerations show that the Court of Appeals below had sufficient authority and reason to revise the earlier judment which had been

rendered by it in violation of explicit federal statutory law and to schedule thereafter the case anew for reargument. In exercising this power, the Court of Appeals did no more than its duty. Certainly, it did not exceed the powers granted to it by law. Nor did it do anything different from that which district courts do when they set aside a judgment pursuant to Rule 60(b) of the Fed. R. Civ. P. or allow an independent action to set aside a judgment. See Pickford v. Talbot, 225 U.S. 651 (1912). The cases cited herein show that the issues upon which petitioners request this Court to grant certiorari are issues wich have long been settled by this Court and which therefor do not need to be reviewed upon cerriorari. Accordingly, respondents contend that the petition should be denied so that the Fourth Circuit can decide the merits of this case in light of the decision in Bakke, surpa, as previously ordered by this Court. 438 U.S. 912.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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